IN THE SUPREME COURT OF FLORIDA
Case No.: SC15-2150

ADVISORY OPINION TO THE ATTORNEY GENERAL RE: RIGHTS OF ELECTRICITY CONSUMERS REGARDING SOLAR ENERGY CHOICE

SUPPLEMENTAL BRIEF OF
FLORIDA ENERGY FREEDOM, INC.
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SUPPLEMENTAL BRIEF OF FLORIDA ENERGY FREEDOM

Florida Energy Freedom, Inc. respectfully submits this supplemental brief to address arguments Consumers for Smart Solar, Inc. ("CSS") makes in its Supplemental Answer Brief (the "CSS Supplement") in response to Florida Energy Freedom's initial brief (the "FEF Brief"). Florida energy Freedom also addresses arguments from the CSS Answer Brief (the "CSS Answer") where the CSS Supplement has incorporated them by reference.

1(a). The proposed amendment establishes no right to own or lease solar equipment, but rather reduces to writing a narrow right that already exists under Article I, Section 2 of the Florida Constitution.

Subsection (a) of the proposed amendment reduces to writing a narrow right to solar equipment which is (1) installed on an electricity consumer's property (2) for the purpose of generating electricity (3) for the electricity consumer's own use.[1] This narrow right to "acquire, possess and protect property" in solar equipment already exists under Fla. Const. Art. I, §2, and so cannot be revoked by statute:

> It is hard to imagine by what basis the Legislature could prohibit anyone from owning or leasing "solar equipment installed on their property to generate electricity for their own use" under a Florida Constitution that provides an "environment for self-reliance and individualism."

[1] The full text of subsection (a): "Electricity consumers have the right to own or lease solar equipment installed on their property to generate electricity for their own use." Subsection (a) is subtitled "Establishment of Constitutional Right," and the proposed amendment itself is entitled "Rights of Electricity Consumers Regarding Solar Choice." Fla. Const. Art. X, §12(h) says "[t]itles and subtitles shall not be used in construction," so neither titles nor subtitles grant any rights.

FEF Brief at 5. Responding to this brief, CSS reaffirms in its supplemental brief what it originally claimed to be the primary effect of the proposed amendment:

> Nothing in article I, section 2 would prevent the Legislature or local governments from barring the installation or use of solar panels…Thus, the establishment of a specific constitutional right to own or lease solar equipment, install it on one's property, and use the electricity it generates, creates clear protection that does not already exist in the Constitution.

CSS Answer at 9-10, referenced in the CSS Supplemental at 2. To this end, CSS then explains that the proposed amendment would establish a single express right:

> It is true that the [proposed amendment] would establish a specific constitutional right to own or lease solar equipment. If something is not covered by the language of that express right, then the Solar Rights Amendment would not establish a right to the matter not covered.

CSS Supplement at 3. As Florida Energy Freedom explained in its initial brief, this single express right already exists under the Florida and federal constitutions.

It is true that "[t]he Florida Constitution is not a grant of power to the Legislature, but a limitation on that power. See, e.g., Bush v. Holmes, 919 So. 2d 392, 406 (Fla. 2006)." CSS Supplement at 3. Fla. Const. Art. I, §2 protects the right "to acquire, possess and protect property." This Court said that "[t]he right to contract and to use one's property…are fundamental rights guaranteed by the constitution[s] of the United States and…of Florida." Palm Beach Mobile Homes, Inc. v. Strong, 300 So. 2d 881, 884 (Fla. 1974).

CSS states that Fla. Const. Art. I, §2 "creates only a general right to property ownership." CSS Supplement at 3. But this fundamental right is not aspirational –

it has been practically applied to the protection of property in all its forms, as when this Court said that to disallow utilities an "opportunity to earn a fair rate of return would violate the rights to due process, to just compensation for taking of property and the right to possess and protect property. Fla. Const. Art. I, §2." Gulf Power Co. v. Bevis, 289 So. 2d 401, 403 n.1 (Fla. 1974). This Court also said that Fla. Const. Art. I, §2 guarantees "the right to acquire, possess, and protect property ….[and a] plaintiff's right to commence an action is a valid and protected property interest." Am. Optical Corp. v. Spiewak, 73 So. 3d 120, 125-26 (Fla. 2011). This Court has read Fla. Const. Art. I, § 2 as a substantive check on the Legislature's power over the fundamental right to acquire, possess, and protect property. Solar equipment is no more beyond this right than are utility rates or causes of action.

CSS describes FEF's argument as "based on the false premise that the Florida Constitution provides an unlimited right to use or install solar equipment today." CSS Supplement at 2. Florida Energy Freedom acknowledged in its initial brief that like any fundamental right, the right to property is "held subject to the fair exercise of the power inherent in the State to promote the general welfare of the people..." Golden v. McCarty, 337 So. 2d 388, 390 (Fla. 1976). To determine what constitutes a "fair exercise of the police power," this Court has "used the reasonable relationship test, which the State asserts is applicable in this case, to evaluate statutes and regulations that infringe on property rights." Haire v. Fla.

Dept. of Agric. & Consumer Affrs., 870 So. 2d 774, 783 (Fla. 2004). "Under this standard of review, a "state statute must be upheld . . . if there is any reasonable relationship between the act and the furtherance of a valid governmental objective." Id. at 782. To show that the Legislature can currently ban solar equipment, CSS applies this standard of review to three similar examples:

> As a result, notwithstanding this provision, the Legislature has prohibited and restricted the ownership or possession of many types of property. See, e.g., §893.13, Fla. Stat. (2015) (prohibiting individuals from possessing certain types of drugs); Rule 68A-6.002, F.A.C. (2008) (banning the possession of certain wildlife); see also Paternack v. Bennett, 190 So. 56, 57-59 (Fla. 1939) (upholding a statute providing that "[t]he right of property in and to any [slot] machine . . . is hereby declared not to exist").

CSS Answer at 9. But despite the comparison CSS makes, the ownership of solar equipment can be distinguished from the possession of invasive species, illicit narcotics, and lethal injections chemicals, all of which are deadly.[2] The ownership of solar equipment can also be distinguished from the ownership of slot machines, which this Court described as having such a "baneful influence on the persons who indulge in playing them [and are] subject to the police power of the State to regulate, control, prohibit or destroy them." Pasternack v. Bennett, 190 So. 56, 57 (Fla. 1939). The Legislature may prohibit all the types of property CSS listed above to further valid governmental objectives. But this has no bearing on the

[2] Rule 68A – 6.002, F.A.C. prohibits keeping invasive species. §893.13, Fla. Stat. prohibits possessing many substances, including those used in lethal injections.

Legislature's ability to prohibit solar equipment, to which neither lethal threat nor "baneful influence" nor any comparable risk has ever been attributed.[3]

However, this Court has applied rational basis review to other prohibitions of property more comparable to solar equipment. When a municipality banned surfboards from all its beaches, this Court held that it "may regulate and control surfing….[but] the complete prohibition of this sport from all the beach area is arbitrary and unreasonable." Carter v. Palm Beach, 237 So. 2d 130, 131-32 (Fla. 1970). Florida courts have found that restrictions on some types of property that are otherwise constitutional can be unconstitutionally applied to other types of it:

> [A]n ordinance was enacted which [intended] to protect residential neighborhoods against the…presence of commercial vehicles. We can readily imagine circumstances in which [it] may be unconstitutionally applied as for example to a station wagon [not] used in business[.]

Henley v. Cape Coral, 292 So. 2d 410, 411 (Fla. Dist. Ct. App. 1974). Compared to the prohibition of dangerous contraband CSS makes, the prohibition of solar equipment is better compared to the prohibition of surfboards and station wagons. Courts have rejected banning such benign property as arbitrary and unreasonable. The narrow right to own or lease solar equipment reduced to writing by the

[3] The installation of rooftop solar equipment by individual Americans has been described as "the largest near-term threat to the utility model" by the Edison Electric Institute, an association of "shareholder-owned electric companies," in a 2013 report titled Disruptive Challenges: Financial Implications and Strategic Responses to a Changing Retail Electric Business, available at www.eei.org.

proposed amendment already exists under the Florida Constitution. It can neither be revoked by the Legislature, nor established through a constitutional amendment.

1(b). This right to self-generate electricity is inherent in the basic common law property principles of both the Florida and federal constitutions.

The narrow right reduced to writing by the proposed amendment is but one expression of the inherent right to self-generate electricity. To draw a comparison:

> No one would suggest that an individual lacks the legal right to start and maintain a fire in their own house in a stove for cooking or in a fireplace for heating and aesthetic enjoyment. Further, it is commonly understood that property owners can use fire on their premises for any purpose that conforms to applicable laws, regulations, and codes regarding health and safety. Fire is one way to harness energy for useful purposes. Electricity is another….[j]ust as you have a right to grow trees in your yard that you could harvest and use for fuel in a stove to cook and heat your house, you have an equal right to "harvest" the solar energy on your roof and to purchase a collector to transform it into usable electricity for powering…on your own premises.[4]

In these same ways, even though '[n]either the U.S. Constitution nor any state constitution expressly establishes a person's right to generate electricity…such a right is consistent with the right to use and enjoy one's property;" in fact, where government limits self-generation, a property owner may be able to successfully challenge it under the Fifth Amendment Takings Clause of the U.S. Constitution.[5]

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[4] Jon Wellinghoff, fmr. Chair of the Federal Energy Regulatory Commission, and Steven Weissman, fmr. admin. law judge at the California Public Utilities Commission, The Right to Self-Generate As a Grid-Connected Customer, 36 Energy L.J. 305-326, at 314 (2015), available at www.felj.org.

[5] Id. at 314, citing John D. Echeverria, "From a 'Darkling Plain' To What?," 30 Vt. L. Rev. 969 (2005) (on Fifth Amendment takings: "essentially every state has an analog of the Takings Clause in its own constitution").

When regulation denies a property owner of "'all economically beneficial us[e]' of her property," it constitutes a "total regulatory taking" that must be compensated. Lingle v. Chevron USA, 544 U.S. 528, 538 (2005).[6] Even if solar equipment is considered personal property instead of an improvement to the land, a total regulatory taking remains impermissible where personal property has been deprived of all its economically productive use beyond "sale or manufacture." Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1027-28 (1992). Solar equipment produces electricity, and can improve property values, so it has an economically productive use beyond its sale or manufacture.[7] Consequently, a prohibition by the Legislature of solar equipment like that which CSS describes would be an unconstitutional "Lucas-type 'total regulatory taking.'" Lingle, 544 U.S., at 548.

No right is exempt from "applicable laws, regulations, and codes regarding health and safety," but where the self-supply public services like water and sewage risk jeopardizing public health, the right to self-generate electricity – especially where derived from clean, quiet solar equipment – entails only a marginal risk to:

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6 "The Takings Clause of the Fifth Amendment" was "made applicable to the States through the Fourteenth [Amendment]." Lingle, 544 U.S., at 536.

7 Fifth and Fourteenth Amendment rights are not unlimited; no one "can obtain a vested right to injure or endanger the public." Lucas, 505 U.S., at 1058. But solar equipment comes with no such risks, and its specifics can always be regulated by government's inherent powers of public health, safety and welfare, as they are under §163.04, Fla. Stat. (2015), which forbids the prohibition or effective prohibition of solar equipment, but permits its reasonable regulation.

> [U]tility repair crews and other emergency workers, who could be injured if [solar equipment] back-feed[s] power to the electric system during outages …[t]his risk can be effectively negated by using automatic…devices which separate the operation of distributed generating facilities from those of the larger electric grid…[so the risk is] easily contained and mitigated.[8]

This risk is wholly eliminated where the right to self-generation is limited to the right reduced to writing by the proposed amendment, which is limited to solar equipment installed on an electricity consumer's property for the purpose of generating electricity for the electricity consumer's own use. This narrow right spells out no constitutional right to generate electricity for others or to connect to the electric grid. Without such connections, this marginal public risk is eliminated.

Solar self-generation that does not affect public health, safety, and welfare is already a right in Florida, and there is no requirement to connect to an electric grid. In a well-known 2014 example, the City of Cape Coral brought a homeowner before a magistrate to compel her to connect to water and electric services. The magistrate found her "guilty of not being hooked up to an approved water supply," but found her "not guilty of not having a proper …electrical system" even though her electricity came solely from solar equipment unconnected to the electric grid. [9]

Though the right to self-generation, like the right to solar equipment it contains, is not unlimited, it exists as surely as does the right to property itself.

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8 The Right to Self-Generate, at 313.

9 Id.

The proposed amendment creates no new right – it reduces to writing a narrow right that exists under the U.S. Constitution, the Florida Constitutions, and under the common law property principles that preceded every American constitution.

2. The proposed amendment embeds a statutory prohibition against power purchase agreements into the Florida Constitution.

The proposed amendment not only reduces to writing a right which already exists, but it also embeds a prohibition on power purchase agreements ("solar PPAs") into the Florida Constitution.[10] This is because it "defines which leases electricity consumers have a right to enter into, and excludes solar PPAs," impliedly prohibiting them. FEF Brief at 14-15. Power purchase agreements are already prohibited in Florida on similarly implied grounds:

> Section 366.02(1) defines a "public utility" as every "person, corporation…or other legal entity…supplying electricity or gas…to or for the public." A lease where payments "vary…based on the amount of electricity produced" is a sale of electricity by an entity other than a public utility, and so is prohibited by statute.

[10] Florida Energy Freedom referenced the prohibition by statute of power purchase agreements in Florida, Kentucky, North Carolina, and Oklahoma in its initial brief. But the Arizona Constitution bans these arrangements as well, and its analysis of Analysis of the Arizona Constitution's treatment of PPAs: ACC DOCKET NO. E-20690A-09-0346 (Ariz. Corp. Comm'n., 2010). This regulatory proceeding shows the sort of restrictions on individual rights and changes in state and local energy policy which may yet arise if the proposed amendment takes effect – further adding to its single-subject burden.

FEF brief at 14, n. 2. In PW Ventures, Inc. v. Nichols, 533 So. 2d 281 (Fla. 1988), this Court recognized this implicit prohibition against power purchase agreements in §366.02(1), Fla. Stat. (2015), based on the statute's construction and the weight to which the interpretation of the Florida Public Service Commission was entitled.

> At issue here is whether the sale of electricity to a single customer makes the provider a public utility….PW Ventures says the phrase "to the public" means to the general public and was not meant to apply to a bargained-for transaction between two businesses. The PSC says the phrase means "to any member of the public." While the issue is not without doubt, we are inclined to the position of the PSC.

This Court based part of its conclusion on expressio unius est exclusio alterius ("the express mention of one thing excludes all others"), comparing the statute's effect on natural gas to its effect on electricity to further demonstrate meaning:

> The legislature did not provide a similar exemption for electricity. The express mention of one thing implies the exclusion of another.

The definitions incorporated within the proposed amendment merit interpretation:

> "Lease," when used in the context of a consumer paying the owner of solar electrical generating equipment for the right to use such equipment, means an agreement under which the consumer pays the equipment owner/lessor a stream of periodic payments for the use of such equipment, which payments do not vary in amount based on the amount of electricity produced by the equipment and used by the consumer/lessee.

This definition is far more specific than that from PW Ventures which this Court determined as impliedly excluding power purchase agreements. It is noteworthy because the proposed amendment reduces to writing only a narrow right to own or lease solar equipment which is (1) installed on an electricity consumer's property

(2) for the purpose of generating electricity (3) for the electricity consumer's own use. The proposed amendment defines solar equipment as follows:

> "Solar equipment," "solar electrical generating equipment" and "solar" are used interchangeably and mean photovoltaic panels and any other device or system that converts sunlight into electricity.

Therefore, "when used in the context of a consumer paying the owner of solar electrical generating equipment for the right to use" the right to lease solar equipment, which is defined as anything that converts sunlight into electricity, would be constitutionally limited to leases structured according to the definition put forth in the proposed amendment. This definition specifically excludes power purchase agreements, under which every payment "var[ies] in amount based on the amount of electricity produced by the equipment." As CSS notes on page 3 of its Supplement "[t]he Florida Constitution is not a grant of power to the Legislature, but a limitation on that power." The proposed amendment defines the word "lease" so as to give it a meaning specific to the "solar equipment" it defines. The definition at issue neither provides that "the legislature shall enact laws governing the enforcement of this section" as in Fla. Const. Art. I, §24, nor does it "shall enact legislation implementing subsection (b)," as in Fla. Const. Art. I, §8. The proposed amendment limits the Legislature's authority regarding solar PPAs in a way similar to Fla. Const. Art. III, §11, which restricts some types of laws on private contracts – itself another substantive change to the Florida Constitution.

3. The proposed amendment would not freeze the existing allocation of government powers; it would actively scale them back.

Florida Energy Freedom argued on page 19 of its initial brief that use of the words "shall retain" is an imperative directive that state and local government may not give up their abilities to regulate solar equipment under the proposed amendment – particularly with respect to "ensur[ing] that consumers who do not choose to install solar are not required to subsidize the costs of backup power and electric grid access to those who do." State and local government already has the power to do this under its implicit powers to regulate for the sake of health safety and welfare. "The current allocation of authority to regulate solar energy is established by statute." CSS Supplement at 5. But when an amendment to the Florida Constitution retains current law, it uses language similar to that used in Fla. Const. Art. I, §24, which says that [a]ll laws that are in effect on July 1, 1993 that limit public access to records or meetings shall remain in force."[11] The proposed amendment makes no such specification. If its drafters wanted to retain all laws, they would need only incorporate all statutes delineating "allocation of authority to

[11] This has been the form by which the Florida Constitution incorporates statutory law since at least 1934. From Coleman v. State ex rel. Race, 159 So. 504, 505-06 (1935): "House Joint Resolution No. 83, which became a part of our State Constitution (Art. 19) on its adoption as such in the general election on November 6, 1934, amongst other things provides as follows:

'Section 3. Until changed by elections called under this Article, the status of all territory in the State of Florida as to whether the sale is permitted or prohibited shall be the same as it was on December 31, 1918'"

regulate solar energy is established by statute" prior to a set date. But the words "shall retain" imperil existing statutes in a way that this method has not.

For example, §366.81, Fla. Stat. (2015), which forbids "any rate or rate structure which discriminates against any class of customers on account of the use of such facilities, systems, or devices," is an example of a statute which a utility might argue requires consumers "to subsidize the costs of backup power and electric grid access." This statute represents the state government giving up its ability to set different rates for electricity consumers who use solar equipment; if state government "shall retain" its powers, it may not limit itself in its ratemaking ability in this way. In this way, the proposed amendment might well render §366.81, Fla. Stat. (2015) vulnerable to a charge of unconstitutionality.

CONCLUSION

For these reasons, in addition to those originally described in the FEF Brief, the proposed amendment violates the Florida Constitution, Florida Energy Freedom respectfully requests this Court strike it from the ballot.

Respectfully submitted,
this Monday, February 22, 2016,

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CERTIFICATE OF SERVICE

I hereby certify that on Monday, February 22, 2016, a true and correct copy of the foregoing was electronically filed with the Florida Courts E-Filing Portal, as authorized by Fla. R. Jud. Admin. 2.516, with notice furnished as indicated below:

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Pursuant to Florida Rules of Appellate Procedure 9.210(a), I certify that the foregoing was generated using Times New Roman, a proportionately spaced font, and has a typeface of 14 points.

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